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Nos. 99-1864 and 99-1865

IN THE

Supreme Court of the United States

JAMES B. HUNT, JR., *et al.*,

Appellants

and

ALFRED SMALLWOOD, *et al.*,

Intervenor-appellants,

v.

MARTIN CROMARTIE, *et al.*,

Appellees.

On Appeal from the United States District Court
Eastern District of North Carolina

STATE APPELLANTS' BRIEF ON THE MERITS

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September 8, 2000

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QUESTIONS PRESENTED

(1) Whether a federal court may strike down a state's redistricting plan by substituting its judgment for that of the state legislature, and without requiring the challengers to surmount their heavy burden of demonstrating that race, not politics, was the dominant and controlling rationale in drawing district lines and that traditional redistricting criteria were subordinated.

(2) Whether a final judgment from a court of competent jurisdiction, which holds that a state's congressional redistricting plan does not violate the constitutional rights of plaintiffs and authorizes the state to proceed with elections under it, preclude a later constitutional challenge to the same plan in a separate action brought by plaintiffs in privity with them.

LIST OF PARTIES

JAMES B. HUNT, JR., in his official capacity as Governor of the State of North Carolina, DENNIS WICKER in his official capacity as Lieutenant Governor of the State of North Carolina, HAROLD BRUBAKER in his official capacity as Speaker of the North Carolina House of Representatives, ELAINE MARSHALL in her official Capacity as Secretary of the State of North Carolina, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, and LARRY LEAKE, S. KATHERINE BURNETTE, FAIGER BLACKWELL, DOROTHY PRESSER, and JUNE YOUNGBLOOD in their capacity as the North Carolina State Board of Elections, are appellants in this case and were defendants below;

ALFRED SMALLWOOD, DAVID MOORE, WILLIAM M. HODGES, ROBERT L. DAVIS, JR., JAN VALDER, BARNEY OFFERMAN, VIRGINIA NEWELL, CHARLES LAMBETH, and GEORGE SIMKINS, are intervenor-appellants in this case and were intervenor-defendants below;

MARTIN CROMARTIE, THOMAS CHANDLER MUSE, R.O. EVERETT, J.H. FROELICH, JAMES RONALD LINVILLE, SUSAN HARDAWAY, LOIS WEAVER, and JOEL K. BOURNE are appellees in this case and were plaintiffs below.

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STATE APPELLANTS' BRIEF ON THE MERITS

Governor James B. Hunt, Jr., and the other state defendants below appeal from the final judgment of the three-judge United States District Court for the Eastern District of North Carolina, dated March 7, 2000, which held that District 12 in the State's 1997 Congressional Plan is an unconstitutional gerrymander and enjoined the State from conducting any elections under that plan.

OPINIONS BELOW

The March 7, 2000, majority opinion of the district court and the concurring and dissenting opinion of the Honorable Lacy Thornburg, District Court Judge sitting by designation as Circuit Judge, which have not yet been reported, appear at J.S. 1a and 37a, respectively.[1]

JURISDICTION

The district court's judgment was entered on March 8, 2000. J.S. 71a. On March 10, 2000, the State appellants filed notice of appeal to this Court. J.S. 69a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment. J.S. 73a.

STATEMENT OF THE CASE

A. The 1997 Congressional Redistricting Process

Last term, a unanimous Court in *Hunt v. Cromartie*, 526 U.S. 541 (1999), held that the district court improperly granted summary judgment to plaintiffs in concluding that race was the "predominant factor" in the drawing of Congressional District 12, and remanded the case for trial. In so holding, the Court

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[1] References to "J.S." are to the Appendix of the Jurisdictional Statement; references to "J.A." are to the Joint Appendix.

stated that:

> [e]vidence that blacks constitute even a super-majority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference.

Cromartie, 526 U.S. at 551-52.

The trial confirmed in substantial detail the legislature's constitutional engagement in political gerrymandering in making District 12 a strong Democratic district as part of its broader effort to preserve a six-six partisan balance in its congressional delegation. The General Assembly commenced the complex and difficult task of remedying the constitutional defects in the prior 1992 Plan,[2] while at the same time achieving its partisan political objectives. The General Assembly's redistricting efforts were complicated by the fact that political power was divided between a majority Democratic Senate and a majority Republican House. Indeed, when the redistricting process began, many did not believe that the politically divided legislature could successfully negotiate a plan and prevent redistricting from falling to the federal court by default.[3]

An essential aspect of designing a plan acceptable to the politically divided General Assembly was the protection of all twelve incumbents. This was done in part by preserving the constituent and partisan core of each district. Congresspersons and their representatives, as well as their supporters in the

[2] In *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996), this Court found that race predominated in the design of District 12 and that it could not survive strict scrutiny.

[3] J.S. 82a, 138a; J.A. 179-80, 240-41.

General Assembly, expressed their preferences throughout the redistricting process.[4] The legislature's task was particularly acute in the western part of the State because it is overwhelmingly Republican; the legislature was thus faced with the difficult challenge of creating loyal Democratic constituencies in Districts 8 and 12, while protecting the Republican strongholds in adjacent Districts 5, 6, 9 and 10. Any changes in the configuration of any of those districts could not undermine the strength of the existing incumbents or the passage of the plan would have been placed in jeopardy.[5]

To achieve its goals, the General Assembly established Senate and House redistricting committees to oversee the redistricting process. Senator Roy A. Cooper, III, a Democrat, was appointed Chairman of the Senate Redistricting Committee and Representative Edwin McMahan, a Republican, was appointed Chairman of the House Redistricting Committee. From the beginning, Cooper and McMahan recognized that the only way to reach a compromise was to craft a plan that, while curing the constitutional defects, also preserved the existing six-six partisan balance in the State's congressional delegation.[6] Because party registration is not a reliable predictor of voting behavior in North Carolina, the committees used the actual votes cast in a series of previous statewide elections to design Democratic and Republican districts.[7]

[4] *See, e.g.*, J.S. 83a-84a, 138a, 207a-10a; J.A. 180-86, 657.

[5] *See, e.g.*, J.S. 83a-86a; J.A. 182, 185-88, 191, 623-24, 634-35, 637-38.

[6] *See, e.g.*, J.S. 82a, 94a, 99a-100a, 138a; J.A. 180, 187-88, 235, 240-41, 406-07, 780.

[7] J.S. 206a-07a; J.A. 397, 779-80. *See also* J.S. 173a-74a. The redistricting computer database included voting results at the precinct level for three state races: the 1988 Lewis/Smith Court of Appeals election, the 1988 Rand/Gardner Lieutenant Governor election, and the 1990 Gantt/Helms United States Senate election. In addition, some more recent election results also were available to the committee chairman through other sources. J.S. 83a-84a, 138a-139a; J.A. 188-90. The results from the two

Computer software allowed the plan's drafters to view voting data by precinct, enabling them to move precincts and draw district boundaries throughout the State based on actual voting patterns.[8]

Acutely conscious of its legal obligations, the General Assembly sought to cure the defects in the 1992 plan by assuring that racial considerations did not predominate over traditional race-neutral redistricting criteria in the drawing of districts. The new plan was thus designed to: (1) avoid dividing precincts; (2) avoid dividing counties, except as needed to maintain partisan balance; (3) eliminate "cross-overs," point contiguity, long narrow corridors and other artificial means of maintaining contiguity; (4) group together citizens with similar needs and interests; and (5) ensure ease of communication between voters and their representatives. Although improving the overall appearance of District 12 and other districts was a major consideration in curing the defects found in the previous plan, mathematical measures of compactness were not utilized in constructing or evaluating the new plan.[9]

Other important legal requirements also influenced the design of the 1997 Plan. First and foremost were federal one person, one vote requirements, which meant that politically desirable precincts along the border of a proposed district sometimes could not be included in a district and still maintain

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1988 elections were given the most weight by the legislature because they were a better test of generic party voting preferences. The judges' race, for example, involved candidates who were known to most voters only by their party affiliation. J.S. 206a-07a; J.A. 189. *See also* J.A. 611, 613, 652.

[8] *See, e.g.*, J.A. 518-20, 585-87.

[9] *See, e.g.*, J.S. 82a-84a, 138a; J.A. 179, 190-91, 200-01, 212-13, 382-83, 393-96, 405-06, 431, 464-65, 474, 476.

an acceptable population balance.[10] In addition, with respect to District 1, the legislature sought to comply with the requirements of the Voting Rights Act – an obligation that did not pertain to District 12 or the other districts.[11]

On March 31, 1997, a majority of representatives in both houses voted to enact the new congressional districting plan.[12] The most dramatic changes in the new plan are in District 12, which contains less than 70% of its original population and less than one-half (41.6%) of its original geographic area.[13] Although the House and Senate initially differed on the question of extending District 12 from the city of Charlotte in Mecklenburg County northward either to Winston-Salem (the Senate plan) or to High Point and Greensboro (the House plan), the legislature decided there was no logical reason not to include loyal Democratic voters from all three parts of District 12's Triad,[14] rather than effectively wasting their votes by putting them into districts that were overwhelmingly Republican.[15]

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[10] *See, e.g.*, J.A. 613-14, 622, 625. Balancing populations sometimes served other purposes. For example, several precincts in Mecklenburg County were shaved off District 12 to increase the population of District 9 so it did not extend into Lincoln County, and that county could be made whole as part of District 10. J.A. 789-90.

[11] J.S. 85a-86a; J.A. 196, 384. *See also* J.A. 207-09, 385, 621.

[12] Although the 1997 Plan garnered bipartisan support in the divided chambers of the General Assembly, twelve of seventeen African-Americans in the House voted against the plan because they believed it did not adequately take into account the interests of the State's African-American citizens. J.S. 140a; J.A. 242-43.

[13] J.A. 16, 543-44.

[14] The Triad consists of Winston-Salem in Forsyth County, and Greensboro and High Point in Guilford County.

[15] J.A. 192-94, 216, 268, 389. The extension of District 12 to Greensboro boosted the percentage of Democratic voters, based on the two 1988 elections, by five percent. The percent of Democratic voters rose from

To the extent possible, consistent with the difficult task of creating a Democratic district in the predominantly Republican Piedmont Crescent, the 1997 Plan respects the traditional race-neutral redistricting criteria identified by the legislature: District 12 divides only one precinct, for partisan reasons; its appearance is greatly improved over the 1992 plan by being shorter, wider and no longer held together by reliance on artificial devices such as cross-overs and point contiguity. *See supra* note 9. It comprises a district joining together citizens with similar needs and interests in the urban and industrialized areas along the interstate highways that connect Charlotte and the Piedmont Urban Triad,[16] areas in which the bulk of the State's recent population growth has occurred.[17] Moreover, because District 12 is built around major transportation corridors, it functions effectively for representatives and constituents. With 43% of its voting-age population African-American, District 12 is not a majority-minority district.[18] District 12 is, however, a majority Democratic district.

B. Legal Proceedings

After the General Assembly enacted the 1997 Plan, and the 1998 election process had begun, plaintiffs filed suit, challenging the constitutionality of Districts 1 and 12. Plaintiffs moved for a preliminary injunction and for summary judgment. The district court, with Circuit Judge Sam J. Ervin, III, dissenting, granted summary judgment to plaintiffs, declared District 12 unconstitutional, and permanently enjoined the State from conducting any primary or general election under the 1997 Plan. After the State defendants appealed, this

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57.48% to 62.20% in the Rand/Gardner election and from 56.59% to 61.46% in the Lewis/Smith election. J.S. 231a, 241a.

[16] *See, e.g.*, J.A. 383, 400-01, 421, 430, 465, 476.

[17] J.A. 151-52, 751.

[18] Only 46.7% of its total population and 45.6% of its registered voter population is African-American. J.S. 77a-79a.

Court reversed and remanded for trial. *Cromartie*, 526 U.S. at 554. On remand, the district court established a schedule for discovery and set a trial date. After the untimely death of Circuit Judge Sam J. Ervin, III, United States District Court Judge Lacy H. Thornburg was assigned to the three-judge panel.

C. The District Court Opinion

The three-judge panel unanimously ruled that District 1 was constitutionally drawn, but a majority ruled that District 12 was an unconstitutional racial gerrymander and enjoined its use in future elections. The majority began by crediting the State's testimony that the 1997 Plan was drawn to protect incumbents and preserve the partisan core of the existing districts. J.S. 11a. Nonetheless, the court rejected legislators' testimony that District 12 was drawn to fulfill those same partisan goals. Instead, in an opinion which substantially repeated its prior summary judgment opinion, *compare* J.S. 11a-19a *with* J.S. 247a-255a, the panel once again focused heavily on circumstantial evidence of the district's racial demographics and shape, and again, used registration data to impugn the state's motives, J.S. 23a-26a, even though legislators testified that they did not use such data in designing the districts because it was not a reliable predictor of voting behavior in North Carolina. *See supra* note 7. The panel also found significant the testimony of plaintiffs' expert, Dr. Weber, and several isolated statements made by one legislator and state official, which, it said, demonstrated a predominant racial motive in drawing the district. J.S. 26a-28a.

Judge Thornburg wrote a concurring and dissenting opinion. He agreed that District 1 was constitutional, while disagreeing with the majority's application of strict scrutiny.[19]

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[19] The majority's application of strict scrutiny to District 1 is additional evidence of its misunderstanding of the predominance standard. District 1, which has an African-American population of 50.27%, respects traditional race-neutral redistricting criteria: it divides no precincts; it is compact; and

He dissented as to District 12, concluding that plaintiffs had completely failed to meet their burden of showing that race predominated in drawing the district. Defendants, in contrast, "produced ample and convincing evidence" establishing that legitimate "political concerns such as existing constituents, incumbency, voter performance, commonality of interests, and contiguity, not racial motivations, dominated the process surrounding the creation and adoption of the 1997 redistricting plan." J.S. 45a-46a.

SUMMARY OF ARGUMENT

The central issue in this case is whether race or partisan politics predominantly motivated the North Carolina legislature's design of District 12. In its opinion below, the district court agreed with the State that the General Assembly's 1997 redistricting plan was motivated by a desire to maintain a six-six partisan balance in the State's congressional delegation and to protect incumbents. J.S. 11a. The court also found that the design of District 12 fulfilled those objectives since the district is "one of the six predominantly Democratic districts established by the 1997 Plan to maintain the 6-6 partisan division." *Id.* at 11a-12a. Despite those incontestable findings, the court nevertheless concluded that District 12's lines were drawn predominantly on racial, not political grounds. That conclusion is completely at odds with the

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artificial devices such as crossovers and point contiguity were eliminated. Irregularities in the district lines are the result of incumbency protection and other political concerns. J.S. 84a-86a; J.A. 197-200, 232-33, 465. It comprises a district with a community of voters defined by shared interests in the mostly rural and economically depressed counties in the State's northern and central Coastal Plain. J.S. 84a-87a; J.A. 200, 475. The district encompasses an area where the African-American population is sufficiently large and geographically compact to constitute a majority in a district, as the court below recognized. J.S. 33a-34a. Except for its concern that the split counties and towns in District 1 correlated with race, the court did not find that race predominated over other traditional redistricting principles in the design of District 1, yet needlessly applied strict scrutiny.

record.

This Court's precedents make clear that plaintiffs bear the burden of proving the unconstitutionality of a state's redistricting plan. To establish an equal protection violation, plaintiffs must show not simply that race was a possible explanation for the district's lines, or even that the district's boundaries correlate closely with race, but rather that the State's asserted predominant nonracial explanation for the district's design is pretextual, and that the primary motivation is racial. "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify." *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion); *see Cromartie*, 526 U.S. at 552. In light of the potential correlation between race and political voting behavior, "[i]n some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines." *Bush*, 517 U.S. at 967 (plurality opinion). Because of the sensitive nature of the legislative districting process – a process reflecting fundamental choices about a sovereign State's political self-identity – and the difficulty of determining predominant motive when both political and racial factors are involved, federal courts are to be "extraordinarily cautious" in evaluating a claim that race and not incumbency protection predominately motivated a State legislature's drawing of district lines. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The question here is whether this case is one in which the partisan balance achieved by incumbency protection explains District 12's lines "as well as, or better than race." *Bush*, 517 U.S. at 958 (O'Connor, J., concurring). The district court answered that question in the negative: because "political explanations . . . utterly failed to explain the composition of the district," J.S. 26a, race was the real, predominant motivation.

Id. at 25a. The court based that conclusion on three grounds, none of which withstands scrutiny.

First, just as it did in its prior opinion on summary judgment reversed by this Court in *Hunt v. Cromartie*, the court relied on voter *registration* data purportedly showing that majority Democratic precincts were excluded from District 12 to rebut the State's assertion that the district was drawn predominantly to protect incumbents and preserve the partisan balance in the State's congressional delegation. The court's reliance on such evidence is untenable. As even plaintiffs' own expert recognized, voter registration data is *not* a reliable indicator of actual voting performance in North Carolina, and for that reason the legislature did not use it to draw district lines. The court's persistence in using a criterion the State disavowed, while ignoring the criterion on which it relied – partisan voting results – was clearly improper, and contravenes the analyses performed throughout the Court's equal protection jurisprudence.

Second, the court credited plaintiffs' expert's statistical analysis, which showed that predominantly African-American precincts were always included in District 12, while white, Democratic precincts were not. But such facts cannot properly be used to establish a predominant racial motive when the undisputed record *also* shows that the precincts that were included not only are Democratic but are *more reliably* Democratic than their contiguous white counterparts outside of the district. Since the selection of these precincts is fully consistent with the legislature's partisan political goals, their inclusion in District 12 cannot *disprove* the State's nonracial explanation for the district's design.

The court also found significant the claim of plaintiffs' expert that if incumbency protection were the true predominant motive for District 12's design, the State could have – and therefore would have – drawn a different, more compact district with more white precincts in the Piedmont Crescent.

But the few alternatives plaintiffs' expert offered up, which would have entailed splitting a county three ways or disrupting the home bases of sitting incumbents, simply were not practicable. Absent any evidence that the legislature ignored viable alternatives, with less racial impact, the court's inference that District 12's design was motivated predominantly by race was completely unreasonable.

Third, and finally, the court pointed to isolated statements from lawmakers that, it said, supported its conclusion that the legislature's motivations in drawing District 12 were primarily racial. But whether viewed alone or together, these evidentiary strands showed, *at most*, that legislators considered race in redistricting. The *consideration* of race, however, is not impermissible, and certainly is not synonymous with the *predominant* use of race. The court's conflation of these principles was improper.

The frailty of the evidence of racial predominance is even more apparent when one compares the record in this case with that proffered in previous redistricting cases in which this Court has found unconstitutional racial gerrymandering. Unlike in those other cases, there was no evidence here that the State adopted its redistricting plan under federal pressure to create majority-minority districts. Nor were there any concessions from lawmakers that they sought to maximize African-American voting strength. The record also was bereft of any proof that the district's shape was directly tied to efforts to increase minority-voting power or that districts were designed based solely on block-by-block racial data. In short, this evidentiary record nowhere approaches the level of proof of racial predominance found in previous redistricting cases. If anything, the record shows just the opposite – that lawmakers were motivated principally by the nonracial goals of complying with this Court's precedents, protecting incumbents, and preserving the State's partisan congressional balance.

Dramatic improvements to the district's shape also are

probative of the State's efforts to cure its prior constitutional violation and design districts based mainly on race-neutral goals. The district contains less than 70% of its original population and less than one-half of its original geographic area; its length was reduced nearly in half, making it the third shortest district in North Carolina; it splits only one precinct, for partisan reasons, and uses no artificial means of maintaining contiguity. Indeed, to the extent possible, given the difficult task of creating a Democratic district in the predominantly Republican Piedmont Crescent, the legislature followed traditional redistricting criteria. The resulting district, linking the strongly Democratic urban areas of Charlotte, Winston-Salem and Greensboro, is a perfectly sensible way of bringing reliable Democrats in that area together.

The facts in this case, in short, do not permit the inference that plaintiffs satisfied their burden of showing that the State's predominant nonracial explanation for District 12's design was pretextual, and that the primary motivation was racial. The court's error has implications far beyond this case. If the decision below is permitted to stand, legislators either will be reluctant to give *any* consideration to racial factors for fear that such consideration will constitute racial predominance or they will feel compelled to make race-*conscious* decisions to ensure that districts have sufficient concentrations of white voters to overcome a *Shaw* claim. Neither option is desirable or consistent with equal protection law.

There is another reason to set aside the decision below. The challenge to District 12 in this case is barred by the rules of claim preclusion. In the remedial phase of the earlier *Shaw* litigation, the district court explicitly ruled that the 1997 Plan conformed with constitutional requirements and that it was an adequate remedy for the constitutional defects in the prior plan. Following that ruling, the plaintiffs in the *Shaw* litigation immediately filed an amended complaint in this separate lawsuit - in front of a separate panel - alleging for the first time

in this case that District 12 violated the Constitution. While the two District 12 plaintiffs in this case – the only plaintiffs who actually have standing – were not actually plaintiffs in the *Shaw* litigation, those two also were "virtually represented" by the plaintiffs in the *Shaw* litigation under recognized claim preclusion rules. They are therefore bound by the *Shaw* judgment upholding the constitutional validity of District 12. On this ground as well, the decision should be overturned.

This case, in sum, presents two fundamentally different pictures of the legislature's motivations in enacting the 1997 Plan. One portrait is predominantly political, the other, primarily racial. That the court chose the latter over the former greatly misapprehends this Court's precedents and the seriousness of the burden plaintiffs must meet to prove racial predominance in redistricting. Unless that high bar is reestablished through reversal of the decision, the protections accorded inherently political legislative decision-making will be severely undermined, and redistricting plans that, like North Carolina's, do not convey the message that "political identity is, or should be, predominantly racial," *Bush*, 517 U.S. at 980 (plurality opinion), will be improperly invalidated. This Court should not countenance either result.

I. CAREFUL SCRUTINY OF THE DECISION BELOW IS REQUIRED TO DETERMINE WHETHER PLAINTIFFS HAVE MET THEIR STRINGENT EVIDENTIARY BURDEN FOR PROVING A PREDOMINANT RACIAL MOTIVE.

A. Plaintiffs Must Proffer Compelling Evidence That Race Was The Dominant Factor In The District's Design.

The plaintiffs' burden in any race-based Equal Protection Clause challenge is to establish that the State acted with a racially discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 240 (1976). Mere proof that a State was conscious of

racial factors or that its actions had a racially discriminatory impact is insufficient; the plaintiffs must establish that the State acted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

In cases involving allegations of intentional race discrimination, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from," the party seeking to prove the unlawful discrimination. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Thus, when the State defendant proffers a legitimate, nondiscriminatory explanation for an action that appears to have a discriminatory impact, the burden cannot shift to the State to prove that the asserted rationale was the real reason; rather, the plaintiff bears the burden of proving that the State's asserted reason was untrue, *i.e.*, a mere "pretext" for the real, discriminatory motive. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[A] reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason [is] false, and that discrimination [is] the real reason.").

The plaintiffs' burden is even more difficult in redistricting challenges of the type recognized in *Shaw v. Reno*, 509 U.S. 630 (1993). Plaintiffs may not establish an equal protection violation simply by showing the presence of a racial motivation, but rather, must demonstrate that: (1) the state *substantially* disregarded traditional districting criteria in drawing district lines, *and* (2) that it did so *predominantly* because of racial considerations. *See Bush*, 517 U.S. at 958-59, 962-63 (plurality opinion); *id.* at 993-94 (O'Connor, J., concurring). *See City of Mobile v. Bolden*, 446 U.S. 55, 63 (1980) ("The Court made clear that in the absence of such an invidious purpose [racial classification], a State is constitutionally free to redraw political boundaries in any manner it chooses."). This standard means that plaintiffs cannot merely show that race is a credible explanation for the

challenged district's design. Rather, they must affirmatively demonstrate that the *nonracial* explanation offered by the State is *not* its predominant motivation but rather is a mere "pretext" for the predominant racial motive.

In this case, the State avers that the legislature was motivated not primarily by race in the enactment of its redistricting plan, but rather by a predominant desire to maintain a six-six partisan balance in the State's congressional delegation by designing the districts so as to protect incumbents. It is not disputed that race and political voting behavior correlate tightly in North Carolina – the undisputed evidence showed that African-Americans vote 95-97% Democratic.[20] It also is not disputed that, because of that correlation, the lines drawn to create District 12 *could* be explained by race: the most heavily Democratic precincts in the Piedmont Crescent where District 12 is located also are urban precincts whose residents and voters are, by and large, African-American. But the district's shape also derives from a legitimate nonracial goal: protection of incumbents. That goal is legitimate, irrespective of its effect on a district's shape or demographics:

> If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime.

Bush, 517 U.S. at 968 (opinion of O'Connor, J.); *see Cromartie*, 526 U.S. at 551 ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State

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[20] J.A. 139, 213, 589, 603.

were *conscious* of that fact.").

Thus, when race and political voting behavior are closely correlated, it is simply not enough for plaintiffs to establish that race is a possible, good, or even very good, explanation for a district's lines. *See Bush*, 517 U.S. at 968 (opinion of O'Connor, J); *Miller*, 515 U.S. at 916; *Shaw*, 509 U.S. at 646. Plaintiffs must affirmatively demonstrate that the state's asserted rationale of incumbency protection is *not* the predominant motivation for the district's design. Unless they do so, they have not carried their burden of establishing racial predominance. *See Miller*, 515 U.S. at 916. The central issue in this case, then, is whether plaintiffs have proven anything beyond what they showed at summary judgment: that legislators considered race along with a variety of other factors in redistricting, and that the district's borders correlate with race. A careful review of the evidence and the opinion below, as required by this Court, demonstrates that they have not.

B. A Rigorous Review Of The Record And Decision Below Is Required.

This Court has made clear that in redistricting cases, it will rigorously examine the evidence and the lower court's findings of fact and conclusions of law to determine whether a predominant racial motive has been conclusively shown. *See Bush*, 517 U.S. at 959 (plurality opinion). That is because "[t]he distinction between being aware of racial considerations and being motivated by them" and "the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires" an "extraordinarily cautious" review of a claim that a State has "drawn district lines on the basis of race." *Miller*, 515 U.S. at 916. *Cf. Jefferson v. Hackney*, 406 U.S. 535, 551 (1972) (expressing reluctance to "second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients").

Such rigorous review is particularly warranted in "mixed motives" cases in which the State testifies that legitimate districting considerations – such as a desire to protect incumbents and to produce a certain partisan balance in the delegation – played predominant roles but also concedes that race also was a factor in redistricting. *See Bush*, 517 U.S. at 959 (plurality opinion). In such circumstances, a "careful review" of the legislative process is necessary to determine whether race or politics was the predominant factor in the district's design. *Id.*

Careful review of the record ensures that *only* redistricting plans that engender the constitutional harms said to be caused by a predominantly race-based plan are invalidated. Because only the excessive focus on race "convey[s] the message that political identity is, or should be, predominantly racial," *Id.* at 980 (plurality opinion), and that elected officials' primary obligation "is to represent only the members of [their] group, rather than their constituency as a whole," *Shaw*, 509 U.S. at 648, redistricting plans that are nonracial or that are clearly predominantly motivated by race-neutral factors do not carry racially stigmatizing messages. Careful scrutiny of the record and the lower court's decision is thus necessary to make certain that redistricting plans that do not cause expressive harms are not declared unlawful.

The Court has applied such careful scrutiny in other redistricting cases. For instance, in *Bush v. Vera*, Justice O'Connor, writing for the plurality, engaged in a detailed district-by-district evaluation of the evidence and the lower court's findings to evaluate whether the decision below had sufficient support to warrant affirmance. *See* 517 U.S. at 963-971. Justice O'Connor stated:

> [b]ecause it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that

> race predominated over legitimate districting considerations, including incumbency, can be sustained.

Id. at 965. *See also Voinovich v. Quilter*, 507 U.S. 146, 154-58 (1993) (invalidating judge's finding of fact and/or mixed findings of law and fact that a Section 2 Voting Rights Act violation occurred); *id.* at 158-60 (invalidating the district court's finding that the redistricting plan violated the Fifteenth Amendment because the apportionment board intentionally diluted minority voting strength for political reasons). The same kind of rigorous scrutiny the Court has applied in previous cases is warranted here. And that scrutiny leads to only one conclusion: the decision below is clearly erroneous[21] and requires reversal.

C. A Comparison Of The Evidence In This Case With That In Previous Cases Is Warranted.

Before turning to the court's opinion, it is useful to bear in mind the level of record evidence of predominant racial

[21] It is unclear whether a *de novo* or a clearly erroneous standard applies in this case. While the court purported to apply this Court's predominance test, its opinion reveals that it essentially treated evidence that the district's lines correlated with race and that race was *a* motivating factor as sufficient proof to invalidate District 12's design. This is an application of the wrong legal standard, warranting *de novo* review. Alternatively, if the court did, in fact, apply the predominance standard, its conclusion that race predominated District 12's design is clearly erroneous. *See Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (holding in a case alleging a violation of Section 2 of the Voting Rights Act that courts may correct a finding of fact that is "'predicated on a misunderstanding of the governing rule of law'"); *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (factual findings may be overturned if "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed"); *Uno v. City of Holyoke*, 72 F.3d 973, 978 (1st Cir. 1995) (noting in a voting rights case that "[t]hough the clear error standard is formidable, it is not a juggernaut that crushes everything in its path"). Under either standard, the decision fails.

motivation present in the Court's previous cases. When viewed against this yardstick, it becomes even more apparent that the plaintiffs have failed to carry their evidentiary burden under the predominance test.

In *Miller*, *Bush* and *Shaw*, the record contained clear direct evidence of predominant racial intent by the Georgia, Texas and North Carolina legislatures, respectively. This compelling evidence consisted, in whole or in part, of the following: (1) letters from the Justice Department insisting that African-American voting power be maximized through the creation of majority-minority districts;[22] (2) refusals from the Justice Department to preclear the State's legislative plans as insufficiently empowering for black voters;[23] (3) admissions by the state defendants that the challenged districts were drawn precisely to maximize minority voting power and/or comply with the Voting Rights Act,[24] and (4) the use of census blocks

[22] *See Shaw II*, 517 U.S. at 902 (noting that the Justice Department insisted that two majority-minority districts be created and "opined that the State's reasons for not creating a second majority-minority district 'appeared to be pretextual'"); *id.* at 913; *Miller*, 515 U.S. at 917, 920.

[23] *See Shaw II*, *517 U.S.* at 906, 913; *Shaw*, 509 U.S. at 685; *Miller*, 515 U.S. at 917, 919.

[24] *See Vera v. Richards*, 861 F. Supp. 1304, 1314-16 (S.D. Tex. 1994) (finding that the legislature created a number of "safe" black and Hispanic districts in order to address Voting Rights Act concerns and prepared a "Narrative of Voting Rights Act Considerations in Affected Districts"); *see also id.* at 1337 ("The defendants concede that Congressional Districts 18, 29, 30 were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives to Congress."); *Bush*, 517 U.S. at 961 (plurality opinion) (State concedes "that the three districts at issue 'were created for the purpose of enhancing the opportunity of minority voters to elect minority representatives to Congress'"); *see id.* at 960-61 (noting race-based concessions in State's preclearance submission to the Justice Department); *Shaw II*, 517 U.S. at 906 (State concedes that the redistricting plan's "*overriding* purpose was to comply with the dictates of the Attorney General's . . . letter and to create two congressional districts with effective black voting majorities'"); *Miller*, 515 U.S. at 910 (defendants did not dispute the court's factual finding of predominant racial

to draw districts, which provide only total population and racial data.[25] The circumstantial evidence of the districts' bizarre shape was directly tied to admitted efforts to comply with efforts to maximize African-American voting power.[26]

While the Court has never required proof of all such factors to sustain a constitutional challenge, it certainly has never permitted a redistricting plan to be struck down when the record contains *none* of these factors. The omissions in the record are telling:

• The record does not have any letters from the Justice Department insisting that the State maximize African-American voting strength. To the contrary, the State communicated with the Government only *after* the plan's passage, and then only to inform it that it did not believe that any majority-minority district other than District 1 was justified. J.A. 385. *See also* J.A. 206-09, 597.

• The State never conceded that race predominated District 12's design or that it intended to make that district majority-minority. Quite the opposite, it pursued decidedly nonracial, political goals and significantly reduced District 12's African-American population to below 50 percent. *See supra* note 18.

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motivation); *see id.* at 918 (conceding that "it is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district").

[25] *See, e.g., Bush*, 517 U.S. at 961-62, 970 (plurality opinion) ("unprecedented" use of census block data "enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information"); *Johnson v. Miller*, 864 F. Supp. 1354, 1377-78 (S.D. Ga. 1994) (legislature engaged in a "block by block search for black voters to add to the [district]"), *aff'd*, 515 U.S. 900 (1995). *See also Silver v. Diaz*, 522 U.S. 801 (1997) (three judge court) (invalidating district that was at points "one-block long" and "curve[d] and weave[d] among streets blocks" to pick up minority voters).

[26] *See Shaw*, 509 U.S. at 685-86; *Shaw II*, 517 U.S. at 906; *Miller*, 515 U.S. at 917.

• The State drew districts based on precincts, which are much larger than census blocks, and include political data.[27]

• Since the record is devoid of evidence that lawmakers were pressured to, and pursued, a policy of maximizing African-American voting strength, there is no proof that the district's shape was tied directly to that policy.

In short, as a review of the record and the decision below reveals, there is simply no basis to support the court's conclusion that plaintiffs satisfied their difficult burden of proving that the district's lines were drawn predominantly on race and that traditional redistricting criteria were subordinated.

II. THE COURT IMPROPERLY CONCLUDED THAT RACE, NOT INCUMBENCY PROTECTON, WAS THE PREDOMINANT FACTOR IN THE DESIGN OF DISTRICT 12.

It is axiomatic that, in determining whether a constitutional violation has occurred, a court must start with the presumption that a state legislature has acted in good faith and for permissible motives. *See Mueller v. Allen*, 463 U.S. 388, 394 (1983). That presumption fully applies in redistricting cases. *See Miller*, 515 U.S. at 916 (applying "presumption of good faith that must be accorded [all] legislative enactments"). Indeed, it is particularly important in redistricting cases in light of the "complex interplay of forces that enter [into] a legislature's redistricting calculus" and the core sovereignty function the redistricting process represents. *Id.* at 915-16. Thus, "although race-based decision making is inherently suspect, until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed." *Id.* at 915 (citation omitted).

In this case, the district court, in fact, specifically found that the 1997 Plan was generally drawn to maintain the six-six

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[27] J.A. 518-20, 585.

partisan balance in the State's congressional delegation, and, to that end, had two legitimate, nondiscriminatory goals: "(1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan." J.S. 11a. The panel further acknowledged that "[t]he plan as enacted largely reflects these directives: incumbent Congressmen generally do not reside in the same district, and each district retains at least 60% of the population of the old district." *Id.* Finally the court recognized that District 12 is, in fact, "one of the six predominantly Democratic districts established by the 1997 Plan to maintain the 6-6 partisan division" in the congressional delegation. J.S. 11a-12a.

Yet, despite the court's recognition that the legislature was pursuing legitimate redistricting goals, it relied principally on three stands of evidence to rule that District 12 was not designed predominantly to further those goals. First, the court used registration data to support its conclusion that the district's design was based predominantly on racial factors. Second, relying on the testimony of the plaintiffs' expert, the Court concluded that racial statistics, and only racial statistics, could explain District 12's boundaries. According to the court, the "uncontroverted evidence" demonstrated that:

> The *only* clear thread woven throughout the districting process is that the border of the Twelfth district meanders to include nearly all of the precincts with African-American populations proportions of over forty percent which lie between Charlotte and Greensboro, inclusive.

J.S. 25a (emphasis added); *see id.* 26a ("political explanations utterly failed to explain the composition of the district").

Third, the court relied on a few isolated statements by defendants that, it said, evinced a racial motive. *Id.* 27a-28a. Whether standing alone or taken together, these evidentiary

strands are insufficient to refute the State's showing that partisan politics provided the predominant motivation for District 12's design.

A. The Court Erroneously Discredited The State's Motives Based On Registration Data Rejected By The Legislature.

Repeating an error it made on summary judgment, the court again used *registration* data to impugn the State's motives. This was plainly wrong.

The court relied on maps that showed Democratic registration percentages by precinct. Using this data, the court focused on a few precincts adjacent to District 12 with Democratic majority voter registration rates that were not included in the district. *See, e.g.*, J.S. 13a ("[A]round the Southwest edge of District 12 (in Mecklenburg County), the legislature included within the district's borders several precincts with racial compositions of 40 to 100 percent African-American, while excluding from the district voting precincts with less than 35 percent African-American population, but heavily Democratic voting *registrations*.") (emphasis added); *id.* at 13a-14a (citing precincts in Mecklenburg and Forsyth Counties adjacent to, but not included in District 12, with Democratic "registrations" the court considered significant).

Such "findings" are wholly irrelevant. It was undisputed at trial that voter registration is not a useful indicator of actual voting performance in North Carolina. Indeed, as plaintiffs' own expert acknowledged: "registration data is the *least reliable* data to use for purposes of talking about political performance." J.A. 118 (emphasis added); *see Cromartie*, 526 U.S. at 551 ("[Defendants' expert's] more complete analysis was significant because it showed that in North Carolina, party registration and party preference do not always correspond."). For that reason, the uncontroverted evidence established that

the State used actual partisan voting patterns, not registration data, to draw district lines. *See supra* note 7. The court's failure to evaluate the State's actions against the criterion it *used*, and its reliance on a criterion the State expressly did *not* use – to conclude that race predominated the district's design cannot withstand scrutiny.

The court's approach is fundamentally at odds with settled law. In evaluating whether a state's asserted justification for a particular action is pretextual, its asserted rationale has *always* been compared with the criterion it used to achieve its goals. *See, e.g., Davis,* 426 U.S. at 245-46 (comparing State's use of a written personnel test to hire police officers against State's asserted justification that the test was necessary to predict job performance); *see id.* at 267 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 433 (1975) ("We were unable 'to determine whether the criteria *actually* considered were sufficiently related to the [employer's] legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.'") (emphasis in original); *Feeney*, 442 U.S. at 265, 275-80 (comparing hiring preference for veterans alleged to discriminatorily impact women against State's asserted goals). A predominant racial motive simply may not be derived by comparing the State's asserted rationales against a criterion it did not use.

Ironically, even if the legislature had used registration data, rather than voting patterns, to design District 12, the court's opinion still would be unfounded. The registration data demonstrates that, with only very rare exceptions, the precincts outside of District 12 consistently have Democratic registration below 60%, while the adjoining precincts inside the district consistently have much higher Democratic registration rates – ranging from 60% to over 90%.[28]

[28] Joint Exhibits 107-109 (filed with the Court). On the rare occasions when a precinct within the district is between 50% and 60% in Democratic registration, the Democratic registration for each such precinct consistently is higher than that for its adjoining "excluded" precinct. *See id. See also* App. Br. at 1-3 (maps based on Joint Exhibits 107-109 contrasting Democratic registration figures for precincts inside and outside of District 12).

B. The Court Unreasonably Inferred A Predominant Racial Motive From Expert Testimony That Did Not Refute The State's Showing That Partisanship Predominated The District's Design.

The court also based its racial predominance ruling on particular passages from the testimony of plaintiffs' expert, Dr. Ronald Weber, who – according to the court – "showed time and again how race trumped party affiliation in the construction of the 12th District and how political explanations utterly failed to explain the composition of the district." J.S. 26a. For the critical propositions that "race trumped party affiliation" and that incumbency protection "utterly failed" to explain the shape of the district, the court relied on six distinct passages from Weber's testimony: J.S. 26a (citing Trial Transcript ("Tr.") pages). Not *one* of those passages supports either proposition.

The cited testimony makes the following points:

(1) Tr. 162-63 (J.A. 90-91): District 12 was not designed principally to further a partisan political agenda because it is more Democratic than necessary to elect a Democratic incumbent. Had the legislature really wanted to protect incumbents, it would have taken some voters out of District 12 and placed them in adjacent District 8 to make it more Democratic.

(2) Tr. 204-05 (J.A. 105-07): The counties in District 12 are always divided along racial lines, while predominantly white Democratic precincts were excluded.[29]

[29] This testimony also suggests that a Democratic district could have been drawn using Mecklenburg County as the anchor. The feasibility of this idea is addressed below. *See infra* at 32-33.

(3) Tr. 221 (J.A. 111): Every African-American precinct that could have been assigned to District 12 was assigned, while adjacent districts retained their white Democratic precincts.[30]

(4) Tr. 251 (J.A. 131): When race and politics are disentangled, race predominated the district's design.

(5) Tr. 262 (J.A. 139-140): The assignment of precincts in District 12 is inconsistent with a political motivation because white Democratic precincts were excluded.

(6) Tr. 288 (J.A. 156): A Democratic district could be drawn without putting all of the African-American precincts in that district.

Because the sum total of Weber's testimony proves nothing more than a close correlation between race, voting patterns and District 12's borders, it "utterly failed" to establish that race predominated the district's lines.[31]

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[30] Weber also suggests in this citation that Precinct 77 could have been swapped with "a precinct or two in Forsyth County and have the same partisan result." J.A. 111. This suggestion is discussed below. *See infra* at 30-33.

[31] Weber's testimony was questionable from the start. First, he *presumed* a predominant racial motive from the outset, without considering alternative theories. J.A. 136-37. *See also* J.A. 746. Second, Weber testified that he did not believe that legislative bodies should be entrusted to draw redistricting plans. J.A. 150-51. Finally, Weber erroneously assumed that the State's computer database only permitted legislature's to view and manipulate precincts based on racial factors:

> The computer screen used by the North Carolina Legislative GIS System displays racial breakdowns as the plan designer is working *and does not display political breakdowns*. . . . Assessment of the political character of a district is post-hoc and *cannot be done while precincts are being allocated to a district*.

J.A 302 (emphases added). Weber repeated this error at his deposition, just eight weeks before trial, and did not abandon it until his cross-examination. J.A. 138-39. His supposition was plainly wrong. *See* J.A. 519-20 (showing

First Record Citation

Weber's first assertion that the State's motives were predominantly race-based because the district was overly Democratic was predicated on his view that a 60 percent partisan majority is optimal. J.A. 91. But an examination of voting patterns in the elections the legislature used to draw district lines – elections tracked in the State's computer database and relied on by the plan's drafters – shows that District 12 was *three* percentage points above Weber's optimum figure,[32] and thus, hardly can be said to be overly packed with Democrats.[33] Moreover, *two Republican districts*, 6 and 10, also exceeded the 60-percent figure,[34] and thus, were "overly" Republican. If no impermissible motives are drawn from the creation of two "overly safe," J.A. 91, Republican districts, then no nefarious purpose can be derived from a similar allocation in a Democratic district.

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the political data available to the legislators by precinct). This case is thus significantly different from previous cases in which only racially laden, census block data was available. *See supra* at 19-20.

[32] This figure is derived by averaging Democratic voting returns for the three elections the legislature used to draw district lines. *See* J.A. 80a. Weber's reliance on a single election, the 1990 Senate race, is misplaced because the legislature used all three elections in redistricting. J.S. 206a-207a. Using the Gantt-Helms race alone skews the results because Gantt was the Mayor of Charlotte in District 12, and thus drew higher than average Democratic returns. The State also considered the judges' race, not the Gantt-Helms race, the most reliable indicator of actual party preference because voters generally are unaware of individual candidates' qualities. However, even considering that race alone, Republican Districts 6 and 10 also *exceed* Weber's 60-percent optimum partisan range. J.S. 80a.

[33] Even Weber concedes that all politicians prefer their districts to be as safe as possible. Tr. 265 ("I never met a politician who would admit their district was too safe").

[34] J.A. 80a. This result is derived by averaging Republican voting returns in the three elections tracked in the legislature's database. *See supra* note 7.

Second, Third and Fifth Record Citations

The contention Weber makes in the second contention – that the counties included in District 12 follow racial lines – is really the same as the point made in the third and fifth citations: that District 12 always includes African-Americans, to the exclusion of available white Democrats. That observation provides crucial evidentiary support for the district court's finding of pretext:

> Dr. Weber showed that, without fail, Democratic districts adjacent to District 12 yielded their minority areas to that district, retaining white Democratic precincts. This testimony served to undermine Defendants' contention that race was merely a factor in creating the 1997 Plan's 12th District, and that a desire to place high-performance Democratic areas (which happen to contain minority populations) within Democratic districts could explain the construction of the 12th.

J.S. 26a-27a (citation omitted).

But that conclusion – and the testimony cited to support it – ignores a key, uncontroverted fact: all of the precincts inside District 12 had *higher* Democratic voting rates (and even higher registration rates) than their contiguous white counterparts outside the district.[35] Even Weber was forced to concede this point. J.A. 140 ("Q: Are the white precincts as heavily Democratic? A: No."). The conclusion that race predominated over partisan politics only could be established if it could be shown either that predominantly African-American precincts were included in the district, even though they were *not* reliably Democratic on election day (thus permitting a permissible racial inference to be drawn from the deviation

[35] J.S. 213a, 217a, 221a (maps comparing voting patterns of contiguous precincts inside and outside of District 12).

from the asserted political criterion) or that contiguous white precincts that were *equally loyal* or *more loyal* to the Democratic Party consistently were excluded from the district. Weber's evidence showed neither.[36]

Obviously the district's lines had to be drawn somewhere, and some Democratic-performing precincts would have to be left out. But since the precincts actually assigned to District 12 are the most heavily Democratic, the pattern is perfectly consistent with the State's partisan political explanation, and certainly does not establish pretext. And since African-Americans in the State vote 95-97% Democratic, *see supra* note 20, the fact that the more reliable Democratic precincts also are the most heavily African-American is not at all surprising. Nor is it probative of racial predominance that the divisions of the counties and towns between District 12 and the surrounding districts comport with race, since all the districts were drawn to further partisan political goals, and race and political loyalties in North Carolina are closely correlated.[37] Notably, the precincts and counties in the adjacent Republican districts evince the *same* correlation between race and voting patterns as those in District 12: they are nearly 90%

[36] As the state's expert, Dr. Peterson, concluded after comparing all of the contiguous precincts inside and outside of the district: "[I]n the great majority of instances, the boundary of the 12th District serves to fence in Democrats rather than to fence them out." J.S. 173a. The Court in *Cromartie* deemed Peterson's "more thorough" analysis as "significant because it showed that in North Carolina, party registration and party preference do not always correspond." 526 U.S. at 541. Weber and the district court majority, however, inexplicably dismissed Peterson's segment analysis as "unreliable" in part because he ignored the "core" of the district. Peterson's analysis, however, responded directly to the court's own analysis comparing precincts along the outside of the district boundary with those inside the boundary, except that Peterson looked at all of the precincts and political data, not just registration figures. J.S. 161a-167a, 178a-182a. Weber also compared selected precincts along the district's borders. *See, e.g.*, J.A. 104.

[37] *See* J.S. 189a-91a; J.A. 250-52. *See also* J.A. 564 & n.1.

Republican *and* white.[38] Yet, this nexus among white voters, which bolsters the State's position that the district's lines were the product of a preexisting correlation between race and politics, was left unaddressed.

At bottom, these three record citations do nothing more than demonstrate a correlation between race and District 12's borders. Such a correlation is hardly sufficient to prove that race was the "dominant and controlling" consideration in the district's design and that traditional redistricting criteria were subordinated. *Shaw II*, 517 U.S. at 905; *Miller*, 515 U.S. at 913. Ironically, given the absence of viable Democratic alternatives, the only reason for a legislature seeking to shore up a Democratic district to do what Weber and the court suggest – prefer less reliable districts over more reliable ones – would have been to "whiten up" the district – a constitutionally impermissible goal.

Fourth Record Citation

Because Weber's testimony fails to establish racial predominance, his conclusion at the end of his direct testimony, that race predominated District 12's design, is of no moment. J.A. 131. Since Weber's testimony fails to prove predominance, then his conclusion based on that testimony likewise is of little value.

Sixth Record Citation

Weber's claim that the legislature's political explanation is belied by the availability of an alternative Democratic district that would not need to include as many African-American precincts is completely unfounded. Although the court gave this claim particular significance, *see* J.S. 26a, the record is devoid of any realistic alternatives.[39] Nowhere does Weber

[38] J.S. 77a-79a.

[39] Even if the district could have been designed differently, that would not, in and of itself, establish invidious discrimination. The decision to prefer one design to another is purely the province of the legislature, and the constitutionality of a state's redistricting plan should not depend on the individual preferences of statistical experts or federal courts. *See Miller*, 515 U.S. at 915; *Growe v. Emison*, 507 U.S. 25, 34 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

even demonstrate that his so-called alternatives would significantly improve the district's shape.[40]

Weber's first attempt at crafting an alternative is to point out that Precinct 77, which was split in the 1997 Plan, could have been moved entirely out of District 12 and into District 9. J.A. 110-11. Not only is Precinct 77 in Mecklenburg County, the home base of the Democratic incumbent, but the district to which Weber seeks to assign it, District 9, is represented by Republican incumbent Sue Myrick. Shifting these Democratic voters into a predominantly Republican district would have wasted their votes, and made both districts less safe for their incumbents – the precisely opposite goal of the legislature. Moreover, it is simply impossible to see how Weber's testimony about Precinct 77 supports the conclusion that a more compact district could have been created. Not even Weber claims that moving this single precinct out, and adding others in, would have made the district more compact.

Weber's second attempt is to claim that some of District 12's predominantly African-American precincts could have been placed in adjacent District 8. But this proposal is

[40] Assuming *arguendo* that Weber had been able to identify a few precincts that actually could have been moved out of District 12 and into District 8 to make the latter more safe, that hypothetical possibility could hardly be probative of a predominantly racially discriminatory motive given the almost unimaginable complexity of the districting process. To infer that race and not incumbency protection was the State's predominant motive on the basis of slender deviations from an asserted hypothetical norm would contravene the Court's admonition that courts respect legislative prerogatives and exercise "extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

unworkable. Moving District 12's precincts in Mecklenburg County into District 8 would have split the county three ways between three incumbents – Sue Myrick, Mel Watt, and Bill Hefner. This approach would have disrupted the political bases of two incumbents who both live in Mecklenburg's County's main city, Charlotte. Moreover, as even Weber concedes, a three-way split would have contravened the legislature's goal of not dividing any county into more than two parts,[41] and also would have been likely to raise the suspicion of a federal court for failing to respect traditional redistricting criteria.[42]

Weber also suggested the possibility of using essentially all of Mecklenburg County as the anchor for a Democratic district in the Piedmont Crescent. J.A. 133. The district court did not cite or rely on that suggestion, and it is easy to see why. For the reasons just discussed, Mecklenburg County *had* to be split between a Republican and a Democratic district, because both Democratic and Republican incumbents live in the county seat of Charlotte.[43] Moreover, as even Weber concedes, a

[41] J.A. 179, 754.

[42] Though Weber did not offer any other possibilities for swapping some of District 12's precincts with those in District 8, it bears mention that, as a map of the 1997 Plan shows, *see* J.A. 501, District 8 also could not have expanded further north to reach the Democratic precincts in Rowan County because those precincts are blocked by a large Republican buffer of Republican precincts. Legislators would thus have been forced to include too many Republican precincts in Rowan County before reaching the Democratic precincts in that county, undermining District 8's Democratic base and diluting adjacent District 6's Republican base. District 8 also could not have gone northwest into Iredell County because that would have split District 12 in half, or divided Iredell County between three districts and significantly reduced District 12's width.

[43] Even if such a unified county had been politically feasible, neither Weber nor the court explains how the rest of a Twelfth Democratic district centered around Mecklenburg County could have been drawn, and no realistic options are apparent. For instance, Mecklenburg could not have been joined to neighboring Cabarrus County since Cabarrus was Hefner's

Mecklenburg district would have been only "marginally Democratic," *id.*, and thus, would not have served the State's goal of making a sufficiently safe district to protect the incumbent.[44]

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In sum, the district court's conclusion that Weber's statistical analysis "showed time and again . . . how political considerations utterly failed to explain the composition of the district," J.S. 26a, was clear error. A predominant racial motive simply cannot properly be inferred from evidence establishing that African-American majority precincts are consistently assigned to District 12 when the undisputed evidence *also* shows that those selfsame precincts are not only reliably Democratic but *more* reliably so than their predominantly white, Democratic counterparts.

It also was unreasonable for the court to infer a predominant race-based motive from Weber's claim that District 12 is too Democratic to be explained by incumbency protection, and that a different district would have been drawn if that had been the State's true predominant goal. Those inferences ignore the existence of Republican districts above

home base, and he insisted that his entire county remain in District 8. J.S. 208a; J.A. 205-06, 661-62, 781-82.

[44] In a colloquy during trial, Judge Boyle noted that District 12 in the 1998 Plan was more compact and that the Democratic incumbent prevailed in the 1998 election under that plan. J.A. 204-05. The district court's opinion, however, did not cite or rely on the 1998 Plan as evidence that the State could, hypothetically, have drawn a more compact, sufficiently Democratic district and thus must not have been motivated by partisan considerations. In any event, it is not disputed that the 1998 Plan is much *less* Democratic and, thus, affords a sitting incumbent much less protection than the 1997 Plan. The 1998 Plan eliminated all of Guilford County from District 12, and assigned it, along with loyal Democratic voters, to overwhelmingly Republican Districts 5 and 6, effectively nullifying their votes. *See, e.g.*, J.A. 192-94, 625.

Weber's optimal party level, as well as the undisputed political and geographic constraints on the districting process. Perhaps most devastating is the complete absence of any viable alternatives for a Democratic district in the Piedmont Crescent. In short, nothing Weber offered even tended to show – much less conclusively prove – that incumbency protection did not explain District 12's lines "as well as, or better than, race." *Bush*, 517 U.S. at 968 (O'Connor, J., concurring).

Indeed, when the record evidence is viewed through the proper lens, a striking irony emerges from the decision below. The district court, not the State, seems predisposed to define voters in and out of District 12 based on their race. As noted above, the court's descriptions of the precincts and sections of cities and counties in District 12 are consistently put in racial terms, when in every single instance, the court could just as readily have substituted the phrase "loyal Democrat" for "African-American." And in focusing on the State's failure to prefer the "excluded" majority-white precincts over those actually most loyal to the Democratic party, the panel's opinion effectively suggests that the legislature *should* have been motivated by race – that it should have preferred the "whiter" but less Democratic surrounding precincts over the "blacker," but more Democratic included precincts. Surely *Shaw* claims were never intended to turn the central guarantee of equal protection – race neutrality – entirely on its head.

C. The District's Shape Was Not Probative Circumstantial Evidence Of Motive Because The Shape Was Justifiable On Both Racial And Political Grounds.

This Court consistently has held that the "bizarre" shape of a district "may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913. Relying on this principle, the district court focused on the "meander[ing]"

shape of the district and its evident diversions to "pick up" African American voters, J.S. 25a; *see id.* at 12a-17a, 26a. But the fact that the district's shape was *capable* of being explained by racial factors did not prove that race was the predominant factor. As Justice O'Connor stated in *Bush*: "In some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness in the drawing of bizarre district lines." 517 U.S. at 968.

Dramatic improvements in the district's shape, moreover, only bolstered the legislature's partisan non-racial explanation. At the outset, it bears mention that the legislature's legal obligation was to remedy the constitutional violations in its prior plan, not to begin completely anew in drawing its districts. In accomplishing that objective, the legislature did what other courts and legislative bodies in similar circumstances have been instructed to do: retain the core of the prior redistricting plan, while taking those steps necessary to cure the constitutional violation. *See, e.g., Upham v. Seamon*, 456 U.S. 37, 43 (1982) (per curiam); *Lawyer v. Dep't of Justice*, 521 U.S. 567, 574, 577-81 (1997).

Yet, despite the narrow scope of its constitutional obligation, the legislature made sweeping changes to District 12. As even the court below conceded, the new district eliminated nearly one-third of its population and three-fifths of the land from the prior 1992 design. The district also was shortened by 65 miles from its former length of 160 miles, making it the third shortest district in North Carolina. In addition, legislators widened the district and eliminated split precincts, point contiguity, cross-overs and other artificial means of maintaining contiguity. *See supra* note 9. As much as possible, the district followed natural boundaries such as city lines, main roads and transportation corridors. The district's African-American population was reduced from 56.63% to 46.67% and its African-American voting age population was

reduced from 53.34% to 43.36%. The precincts that were included in District 12 shared a community of interest emanating from their position as urban areas that ran along a major transportation corridor. *See supra* note 16.[45]

In the face of these dramatic changes and the legislature's adherence to traditional redistricting criteria, the court's dismissal of such changes as being of "limited value" and not "advanc[ing]" the State's argument that partisanship dominated the district's design, J.S. 24a, was erroneous. To be sure, District 12 is longer and thinner than the other districts. But that is explained by legitimate and unavoidable political and geographic factors. The goal of creating a Democratic district in the Piedmont Crescent could not be achieved by drawing a circle; the district had to be elongated because the main cities in this part of the State with significant Democratic populations – Charlotte, Greensboro and Winston-Salem – themselves stretch North and South along the Piedmont Crescent. The thinness of the district is attributable to the dense population in that area of the State; expanding the district's lines would have exceeded the population balance and swept in too many neighboring Republican precincts. The legislature also was constrained by the political reality that neither party intended to cede the major cities of Charlotte, Greensboro or Winston-Salem to the other.[46] Moreover, as indicated above, the legislature had to draw the district's boundaries in such a way as to preserve both the Democratic character of District 12 and the Republican character of neighboring districts 5, 6, 9, and 10. Thus, the court's conclusion that the district "winds" and

[45] In this respect, District 12 is similar in concept to Georgia's permissible remedial District 11, which uses the "connecting cable" of Interstate 85 to string together parts of 13 counties to form a district with a distinctive "urban/suburban flavor" and "a palpable community of interests." *Johnson v. Miller*, 922 F. Supp. 1556, 1564 (S.D. Ga. 1995), *aff'd sub nom., Abrams v. Johnson*, 521 U.S. 74 (1997).

[46] *See, e.g.*, J.S. 207a-09a.

weaves to "gobble in" African-American precincts, J.S. 24a-25a, simply ignores the fact that the district could just as readily be described as "wind[ing] and weaving to "gobble in" reliably loyal Democratic precincts in an area of the State that is surrounded by precincts that are predominantly Republican or only marginally Democratic.

The panel's dismissal of the improvements in the 1997 Plan, moreover, is inconsistent with the Court's treatment of changes to other remedial plans in prior cases. For instance, in *Lawyer,* the Court upheld a revised redistricting plan that retained a significant portion of the State's prior plan, even though the district was still irregular in shape and had a significant number of minority voters. 521 U.S. at 574, 577-81. Likewise, in *Wright v. Rockefeller*, 376 U.S. 52 (1964), the Court upheld a redistricting plan that contained four irregularly drawn districts because it recognized the geographic and demographic difficulties of designing districts in that area of the State. "Although the boundary lines were somewhat irregular, the majority reasoned, they *were not so bizarre as to permit of no other conclusion*." *Shaw*, 509 U.S. at 646 (discussing *Wright*) (emphasis added). The facts of this case compel the same conclusion.

D. The Panel's Reliance On Isolated Statements By Legislators That Establish, At Most, That Race Was Considered Does Not Establish That Race Predominated.

This Court has not hesitated to invalidate a lower court decision if the court draws an unreasonable and thus impermissible inference from the record. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984). Here, the lower court drew precisely such unreasonable inferences. The court took anecdotal evidence that legislators were aware of and had discussed race in designing District 12, and inferred a predominant racial motive. This inference was unreasonable in light of the record. *At most*, the evidence suggested that race

was *one* consideration among many in redistricting. Such evidence could thus not be used to establish that race was the "dominant and controlling" consideration, *Shaw II*, 517 U.S. at 905, in District 12's design, and that traditional redistricting criteria were subordinated. *See Miller*, 515 U.S. at 913.

As the uncontroverted evidence established, the goal of the legislature was to design districts that would maintain the partisan balance and protect incumbents. *See supra* note 6. Even the court conceded that these goals were faithfully pursued. *See* J.S. 11a (noting that the plan "reflects these directives"). Yet, from this comprehensive record of the legislative redistricting process, the district court plucked out three isolated statements from defendants, and erroneously construed them as supporting the predominant use of race.

The court first quotes a fragment of a statement by Senator Cooper on the floor of the Senate that the plan provides for a "racial and partisan balance" and uses that statement as evidence that the legislature intended to maintain the ten-two racial balance in the legislature. J.S. 27a. But this ignores the overwhelming thrust of Cooper's testimony: that the legislature sought to comply with the law by adhering principally to race-neutral principles, while ensuring that the redistricting plan was fair to minorities and gave them a "fair shot" at winning an election. J.A. 221-22 (quoting Cooper's testimony).

Moreover, the court omitted Cooper's reference to a "*geographical*" balance in the same phrase as "racial" and "partisan" balance. J.A. 221; *see also* J.A. 460 (Cooper noting that the overall the plan "provides for a fair geographic, racial and partisan balance throughout the State of North Carolina"). The reference to "racial" alongside "geographical" and "partisan" conveys, at most, that the legislature considered *each* of these factors in redistricting. It certainly does not demonstrate that race *trumped* political or geographical factors in the district's design. And since it cannot reasonably be

inferred that "geographical balance" means that the 1997 Plan allocated a specific number of districts based on geographic lines, there was no reason to assume – and plaintiffs did not conclusively demonstrate – that Cooper's reference to race had a numerical connotation.

The court's reliance on a second statement by Cooper during the Senate floor debate that strict scrutiny analysis may not be triggered because District 12 is not majority-minority was wholly beside the point. Cooper was merely reciting his understanding of the current state of equal protection law.[47]

Finally, the district court majority gave considerable weight to a hastily drafted e-mail to Cooper from Gerry Cohen, the legislature's computer technician. J.A. 369. The e-mail deals almost exclusively with details regarding shifts of precincts in District 1. Only the last line of the e-mail even purports to address District 12. The phrase that Cohen had "moved Greensboro Black community into the 12th and now need to take bout [*sic*] 60,000 out of 12th," *id.*, was merely a shorthand description for those sections of Greensboro that were added to the district – areas that were predominantly African-American *and* solidly Democratic. J.A. 629 (Cooper stating that he "already knew that the precincts that were in the predominantly black areas were heavily Democratic"). Surely an equal protection violation cannot turn on Cohen's failure to stick the word "Democratic" between "Greensboro" and "Black."[48]

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[47] The Court recognized in *Lawyer* that "[t]he fact that [a challenged district] is not a majority-black district . . . supports" a decision not to subject that district to strict scrutiny. 521 U.S. at 581. In any event, Cooper's testimony that there was no motive within the legislature to keep the African-American percentage just below 50% is uncontradicted. J.A. 221.

[48] Obviously, in light of the extension of the district to Greensboro, other residents would have to be removed to maintain the population balance. Moreover, the e-mail was simply inaccurate: the changes to the plan referenced by the e-mail added 29 Guilford County precincts to District

Even putting these strands of evidence in their strongest light, these statements, at best, establish that racial considerations were *a* factor in Cooper's thinking – a fact the State readily admitted, J.A. 222, and this Court has found permissible. *See Bush*, 517 U.S. at 958-59 (plurality opinion); *see id.* at 993 (O'Connor, J., concurring). But it is unreasonable to infer racial predominance from these isolated fragments, which neither disprove the State's position that politics predominated the district's design nor establish that traditional redistricting criteria were subordinated. As Judge Thornburg aptly noted, these statements merely reinforce the fact that lawmakers "were conscious of race, aware of racial percentages, on notice of the potential constitutional implications of their actions, and generally very concerned with these and every other political and partisan consideration which affected whether or not the redistricting plan would pass." J.S. 47a-48a n.18.

This Court's holding in *Lynch v. Donnelly*, 465 U.S. 668 (1984), reviewing an Establishment Clause claim, is instructive. In reviewing a district court's determination that a city's inclusion of a crèche in a holiday display lacked a secular purpose, the Court held that the decision could not be sustained because the court drew the wrong inference from the evidence. *See id.* at 680 ("The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.").[49] The same is true here: plaintiffs simply

12, of which 18 were majority white, and involved over 100,000 citizens, of whom about *50,000* were white. J.A. 264-65, 268.

[49] *See also Henry v. C.I.R.*, 170 F.3d 1217, 1233 (9th Cir. 1999) (Tax Court drew "speculative" inferences from the record); *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1248-49 (11th Cir. 1998) (If "there is [no] evidence to support an inference of a causal link between . . . discriminatory animus and the decision to terminate [the] employment" the court will

have not shown that there was "no question" that race predominated the design of District 12.

III. RECOGNIZED CLAIM PRECLUSION RULES BARRED PLAINTIFFS FROM CHALLENGING DISTRICT 12.

The district court erred in even entertaining plaintiffs' challenge to the constitutionality of District 12; this challenge plainly was barred by claim preclusion. On remand from this Court's decision in *Shaw II*, the district court explicitly approved the 1997 Plan's reformation of District 12 "as a constitutionally adequate remedy." J.S. 320a. The plaintiffs in that case did not appeal that ruling. Because the two *Cromartie* plaintiffs residing in District 12 were in privity with the *Shaw* plaintiffs through "virtual representation," they were bound by the *Shaw* decision, and the district court should have dismissed this complaint. The *Shaw* and *Cromartie* plaintiffs merely sought to shop for a more favorable panel and to manipulate the federal court system to render meaningless the adverse result upholding the 1997 Plan in *Shaw*. This Court should reverse the district court and render unsuccessful plaintiffs' tactical maneuvering, which, if condoned, would make federal district courts' review of states' districting decisions judgments without finality.

A. The District Court In Shaw Entered a Final Judgment Holding the Revised District 12 Constitutional.

After holding District 12 unconstitutional in *Shaw II*, this Court remanded the case to the district court for an appropriate remedy. The *Shaw* plaintiffs then amended their complaint and added as plaintiffs Martin Cromartie, Thomas Chandler Muse and Glennes Dodge Weeks, all residents of District 1. J.S.

"disregard the court's ultimate finding of intentional discrimination based on that inference as clearly erroneous.").

283a. That same day, these three plaintiffs filed this separate action, represented by the same attorney who represented them in *Shaw*. With the consent of plaintiffs, all proceedings in this action were stayed pending completion of the *Shaw* litigation.

The General Assembly enacted the 1997 Plan and submitted it to the *Shaw* district court for approval. That court allowed Cromartie, Muse, and the other *Shaw* plaintiffs to raise constitutional challenges to the plan,[50] but they did not make use of that opportunity. Instead, seeking to present their challenge to a panel that they perceived as more favorable, the plaintiffs asked the court to "not approve or otherwise rule on the validity" of the new plan, and to "dismiss this action without prejudice to the right of any person having standing to maintain a separate action attacking [its] constitutionality." J.S. 308a. The state defendants opposed this effort to preserve the challenges to the 1997 Plan and to present them in this lawsuit.

Rejecting the plaintiffs' request that it decline to rule on the merits of District 12, the district court in *Shaw* ordered the 1997 Plan "APPROVED as having adequately remedied the specific constitutional violation respecting former congressional District 12." J.S. 312a. Plaintiffs filed no appeal from that order or the identically worded judgment filed three days later. *Shaw v. Hunt*, 92-202-CIV-5-BR, Judgment (E.D.N.C. September 15, 1997).

One month later, the district court dissolved the stay order in this case. On that same date, plaintiffs filed an amended complaint claiming that Districts 1 and 12 in the 1997 Plan, just approved by the district court in *Shaw*, were unconstitutional. The defendants argued that, under basic principles of claim

[50] The district court directed them to advise the court "whether they intend[ed] to claim that the [new] plan should not be approved by the court because it does not cure the constitutional defects in the former plan." *Shaw v. Hunt*, CA No. 92-202-CIV-5-BR, Order (E.D.N.C. June 9, 1997).

preclusion, the *Shaw* ruling barred the challenge. The district court rejected this argument, stating summarily that the "decision of the Shaw three-judge panel was not preclusive of the instant cause of action, as the panel was not presented with a continuing challenge to the redistricting plan." J.S. 2a-3a.

B. The Doctrine of Claim Preclusion Barred Plaintiffs' Successive Challenge to District 12.

Under the doctrine of claim preclusion, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981). *See also Allen v. McCurry*, 449 U.S. 90, 94 (1980) (both claim preclusion and issue preclusion "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication"); *Comm'r of Internal Rev. v. Sunnen*, 333 U.S. 591, 597 (1948) (citation omitted) (claim preclusion "rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations").

Plaintiffs' claim was thus barred because the validity of District 12, first in the 1992 Plan and then in the 1997 Plan, was the heart of the *Shaw* case previously litigated to judgment. The court below rejected the claim preclusion argument on the theory that the *Shaw* court "was not presented with a continuing challenge to the redistricting plan." J.S. 2a-3a. Presumably, it did so because the *Shaw* plaintiffs sought to avoid an unfavorable ruling by requesting that the *Shaw* court not rule on the validity of the 1997 Plan at all. J.S. 308a. But claim preclusion prevents relitigation not only of issues actually litigated in a prior action, but also of issues that could have been litigated by the plaintiffs. *See Federated Dep't Stores*, 452 U.S. at 398; 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §§ 4406, 4407 (2d ed. 1987) ("Wright & Miller").

The *Shaw* court rightly concluded that it was obliged to rule on the validity of the 1997 Plan's District 12, since it had been offered as a remedy for the constitutionally defective 1992 Plan. J.S. 319a. It therefore ruled explicitly that the 1997 Plan "adequately remedied the specific constitutional violation respecting former congressional District 12" identified in *Shaw II*. J.S. 312a. Though the court below may have disagreed with the judgment entered by the court in *Shaw*, that judgment had preclusive effect. *See Federated Dep't Stores*, 452 U.S. at 398 (*res judicata* not affected "by the fact that the judgment may have been wrong" or by "erroneous conclusion" of court in first case). Under the doctrine of claim preclusion, the final judgment in *Shaw* extinguished any claim that the *Shaw* plaintiffs and their privies had to litigate the validity of District 12.

Only two plaintiffs, J. H. Froelich, Jr. and R. O. Everett, were residents of District 12 with standing to challenge that district.[51] Although neither was a plaintiff in *Shaw*, both are bound by the *Shaw* judgment. Their close associations with lead counsel Robinson Everett, their awareness of the case and consultation with counsel, and the tactical maneuvering that brought them into this litigation as part of an effort to avoid the adverse *Shaw* decision, all bring them into privity with the *Shaw* plaintiffs through the rule of "virtual representation." *See* 18 Wright & Miller, *supra*, § 4457.

As this Court has noted, "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). The general rule that a person must have been a party to a prior

[51] Plaintiff Ronald Linville also tried to challenge revised District 12, but he is not a resident of the district. J.S. 341a. Although the majority of the district court treated the issue as moot, *see* J.S. 30a n.10, the reasons Linville should have been dismissed were fully discussed by Judge Thornburg in his dissenting and concurring opinion. *See* J.S. 64a-67a.

proceeding to be bound by it has a recognized exception "when . . . a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Id.* (citation omitted). Lower federal courts have frequently recognized that, under appropriate circumstances, a person whose interests are adequately represented may be deemed to be privity with prior litigants through "virtual representation," especially in cases involving broad issues of public law, rather than more individualized grievances. *See, e.g., NAACP, Minneapolis Branch v. Metro. Council*, 125 F.3d 1171 (8th Cir. 1997) (prior class action challenging segregated housing and related educational deficiencies bars subsequent action by school children who were not members of initial class), *cert. denied*, 525 U.S. 826 (1998); *Tyus v. Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996) (action challenging city alderman districts on constitutional and Voting Rights Act grounds barred by prior suit for plaintiffs who participated in prior suit and others allied with them); *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990) (action by state legislators challenging flying of confederate flag barred by prior judgment against different legislator raising similar claims); *Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (plaintiff parents and their children precluded from pursuing first amendment claims against school system and state officials because of participation by father and some of the children in similar prior suit); *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 741 (9th Cir. 1984) (entire class of black schoolchildren barred from litigating segregation claims identical to those in prior class action on grounds that overlapping plaintiffs in prior suit adequately represented current class, including children who were not members of initial class); *Petit v. City of Chicago*, 766 F. Supp. 607, 613 (N.D. Ill. 1991) (white police officers bound by prior suit brought by Department of Justice and intervening police officers challenging promotional examinations).

Privity through virtual representation applies when parties to the earlier suit – in this case, counsel Robinson Everett and

his co-plaintiffs in *Shaw* – are so closely aligned with the interests of the present parties as to be their virtual representatives. *Tyus*, 93 F.3d at 454. A necessary condition for preclusion by virtual representation is that there be an identity of interests such that the original litigants adequately represented the interests, or had the same incentive to pursue the interests, of the current plaintiffs. *See NAACP, Minneapolis Branch*, 125 F.3d at 1174; *Petit*, 766 F. Supp. at 611; *Los Angeles Branch NAACP*, 750 F.2d at 742-46. Here, lead counsel Robinson Everett, who was both a plaintiff and lead counsel in *Shaw*, had the same incentive to litigate the validity of District 12 in *Shaw* that he has pursued in this case as counsel through plaintiffs Froelich and Everett, his first cousin. Before the remedial proceedings in 1997, Everett had already devoted five years of litigation to the cause of having District 12 deemed invalid; immediately after the remedial proceedings, he filed this suit to try his case again. There is no reason why the same interests and incentives would not have guided his strategy in the remedial proceedings themselves.

When the necessary identity of interests exists, courts applying claim preclusion through virtual representation consider additional factors, including "'participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, [and] close relationships between the parties and nonparties.'" *Jaffree*, 837 F.2d at 1467 (quoting 18 Wright & Miller, *supra*, § 4457 at 494-99). Those factors favor a finding of virtual representation in this case.

Plaintiff Everett knew his cousin was litigating *Shaw* and joined the suit when his cousin "said that he needed to start over." "He called me and said he needed a plaintiff in Rowan County." J.S. 331a-34a. Plaintiff Froelich had been in business with both attorney Everett and his mother. Froelich knew about *Shaw* while it was pending, discussed it with his old friend, told Everett he was willing to be a plaintiff, and even filed a declaration in *Shaw*. J.S. 335a-37a; J.A. 672-678. Thus, these

plaintiffs were fully on notice of *Shaw*, followed it throughout, communicated with *Shaw* counsel, and became parties only when counsel decided he needed new plaintiffs.[52]

Especially important to this analysis is the tactical maneuvering of the *Cromartie-Shaw* plaintiffs in their efforts to rejuvenate their challenge to the congressional districting plan. Significantly, Cromartie and Muse also were plaintiffs in *Shaw* while it was on remand from this Court's decision in *Shaw II*. They were thus among the *Shaw* plaintiffs who urged the district court not to rule on the merits of the 1997 Plan, apparently for the sole purpose of pursuing the case in a different forum in hope of a more favorable result.

These close affiliations and overlapping of plaintiffs and counsel along with the tactical maneuvering require the application of claim preclusion.[53] Otherwise, "it would allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefiting the entire group." *Tyus*, 93 F.3d at 457. *See also Petit*, 766 F. Supp. at 612-13; *Louisiana*

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[52] In *Richards*, the Court relied on the *absence* of these same factors to hold that nonparties to an initial suit were not precluded by the judgment in that case. *See* 517 U.S. at 802 (parties to two cases described as "mere strangers" to one another); *id.* at 805 (plaintiffs "received neither notice of, nor sufficient representation in," the prior litigation). Decided on these very different facts, *Richards* is not in any way inconsistent with application of the "virtual representation" doctrine in this case.

[53] The mere fact that the same counsel represented the *Shaw* plaintiffs and represents the *Cromartie* plaintiffs is not, of course, controlling. *See S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999). However, it is one thing for successive plaintiffs not claimed to be in privity to hire the same attorney in a matter in which he is experienced. It is a different matter altogether for the same attorney to be counsel to successive plaintiffs when the attorney also was a plaintiff in the first suit and solicits his cousin and business associate as plaintiffs in the second suit and when that attorney engages in tactical maneuvering to try to renew the case in a more promising posture. *See Tyus*, 93 F.3d at 459 (Henley, J., concurring).

Seafood Mgmt. v. Foster, 53 F. Supp. 2d 872, 884 (E.D. La. 1999). If claim preclusion does not apply in a case like this, then attorney Everett or any similarly invested attorney will be able to bring the same suit over and over, recruiting new plaintiffs, until he prevails. Interested persons like plaintiffs Everett and Froelich will be able to await the results of the first, second, or even third case and then pursue the same claim again.

Redistricting challenges are the type of public law claims that are particularly appropriate for claim preclusion based on privity through virtual representation. In this case, plaintiffs Froelich and Everett have not claimed they were denied the right to cast their individual votes. *See Tyus*, 93 F.3d at 457. Instead, they asserted they had been harmed as a result of their residence in the congressional district, a harm shared under this Court's decisions with more than 550,000 other persons.[54] *See United States v. Hays*, 515 U.S. 737, 745 (1995); *see also Shaw II*, 517 U.S. at 904. If claim preclusion does not apply in a case like this, then plaintiffs in later suits may sit back and await the judgment in the first case, knowing they will benefit from a favorable judgment and having no incentive to intervene. *See Petit*, 766 F. Supp. at 613; *Tyus*, 93 F.3d at 456. To allow such successive suits would "discourage the principles and policies the doctrine of res judicata was designed to promote" – the principles of finality of litigation and limiting persons to a single "bite at the apple." *See Petit*, 766 F. Supp. at 613.

Because plaintiffs "raise an issue of public law" that otherwise would encourage "fence-sitting," this is precisely the type of case for which claim preclusion by virtual representation is appropriate and, indeed, essential. *See Tyus*, 93 F.3d at 457 (applying claim preclusion through virtual

[54] This Court noted a similar distinction for claim preclusion purposes between the type of private taxpayer suit it addressed in *Richards* and more generalized taxpayer actions for which claim preclusion would be more freely available. *Richards*, 517 U.S. at 803.

representation to vote dilution claims under Section 2 of the Voting Rights Act of 1965 and the United States Constitution). Thus, school desegregation claims by school children not part of the plaintiff class in a prior lawsuit were barred in part because, absent privity through virtual representation, "those claims would assume immortality." *Los Angeles Branch NAACP*, 750 F.2d at 741. Particularly in public law suits such as this, where the harms are more generalized and the potential plaintiffs number in the hundreds of thousands, groups of affiliated persons should not be allowed to bring successive lawsuits free of claim preclusion restrictions. The district court's failure to recognize that claim preclusion barred plaintiffs' District 12 challenge led to the court's unwarranted intrusion into the State of North Carolina's sovereign responsibility to determine its congressional districts and disrupted the electoral process repeatedly and unnecessarily. The district court's decision requires reversal.[55]

[55] As a remedy for its conclusion that the 1997 Plan is unconstitutional, the district court ordered that the State adopt a new districting plan in time for the imminent 2000 election. This Court stayed that order, and it is now likely that the 2000 election will have been held before this Court issues its decision in this case. If the Court affirms the judgment below, the State respectfully requests that the Court vacate the district court's remedial order, and require only that the State adopt a new plan for the 2002 election. This Court has repeatedly allowed elections to proceed even under concededly invalid districting plans and required no new elections to be held when "equitable considerations" such as the disruption to the legislative process and the lack of ample time to enact a new plan require it. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). *See Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 655 (1964); *Roman v. Sincock*, 377 U.S. 695, 711-12 (1964); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 739 (1964). Anticipating that, if the judgment below is affirmed after the 2000 election has been conducted, the plaintiffs are likely to seek an order from the district court setting aside the results of that election and requiring an interim congressional election, the State asks that the Court make clear that any relief accorded the plaintiffs as a result of an affirmance does not include requiring the State to hold an interim election for members of Congress prior to the 2002 election.

CONCLUSION

For the reasons stated, this court should reverse the district court's ruling and remand for entry of judgment for the State. defendants.

Respectfully submitted,

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September 8, 2000

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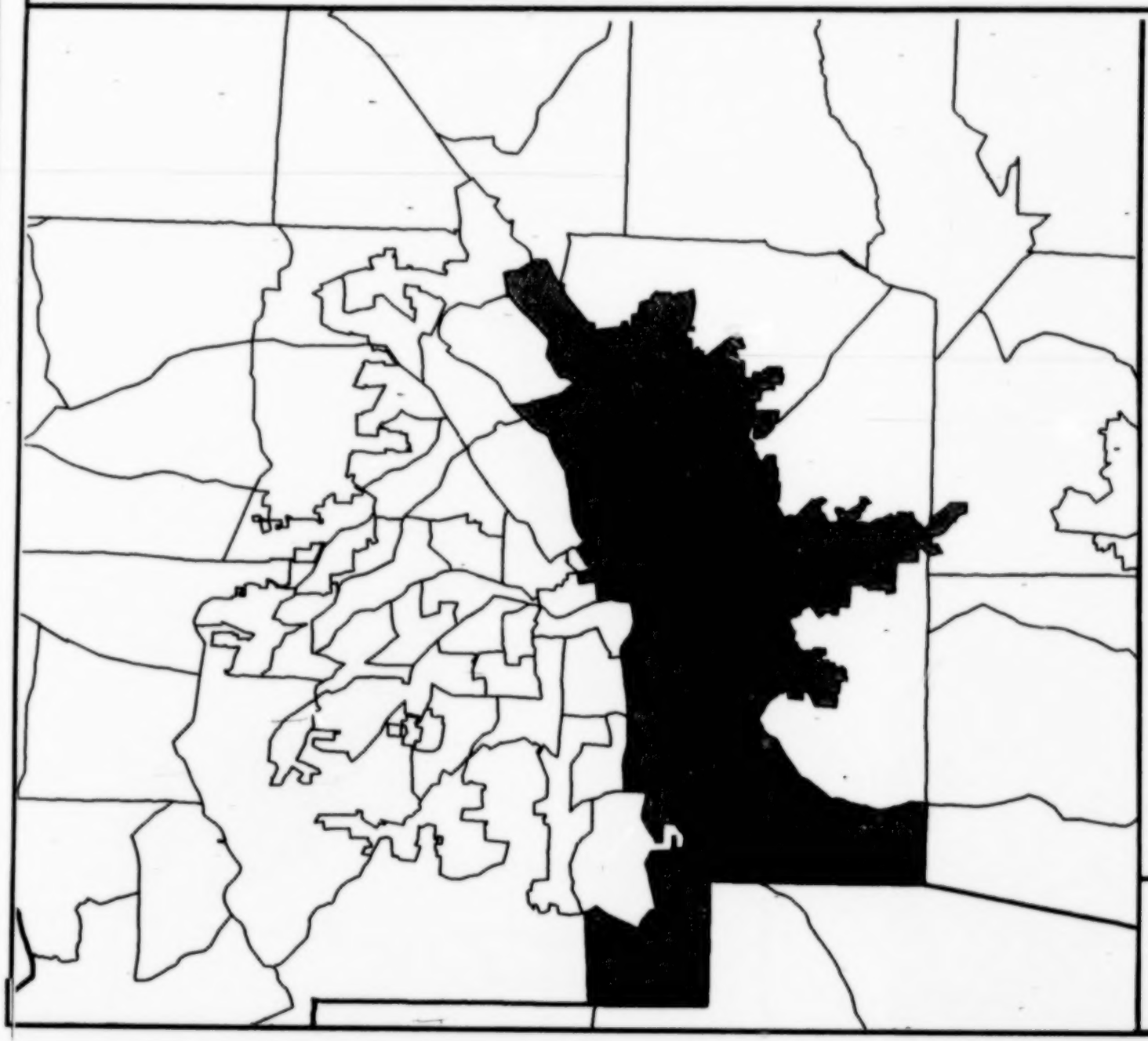

Legend

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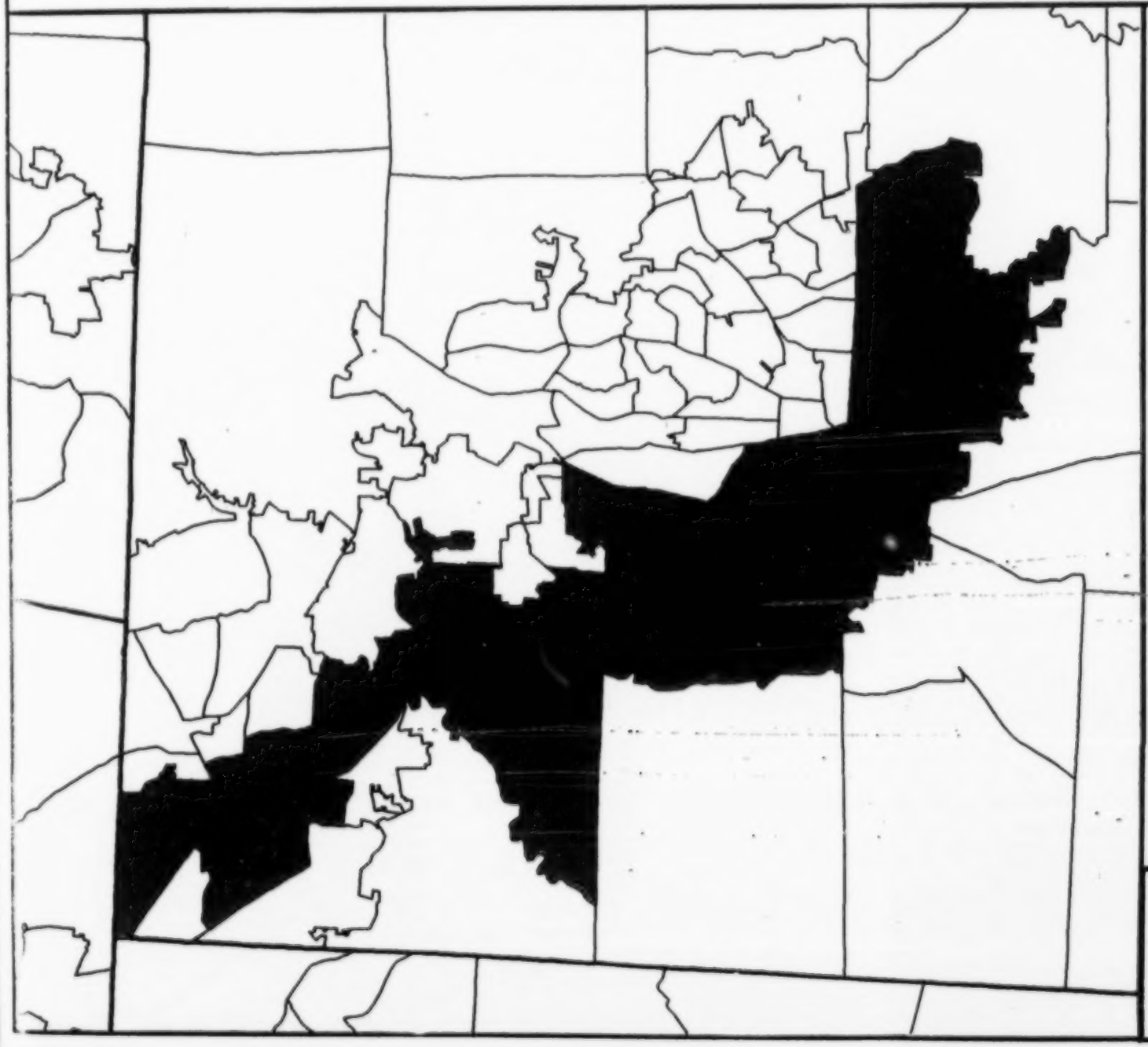
N.C. General Assembly,
Information Systems Division

Guilford County District 12 Precincts



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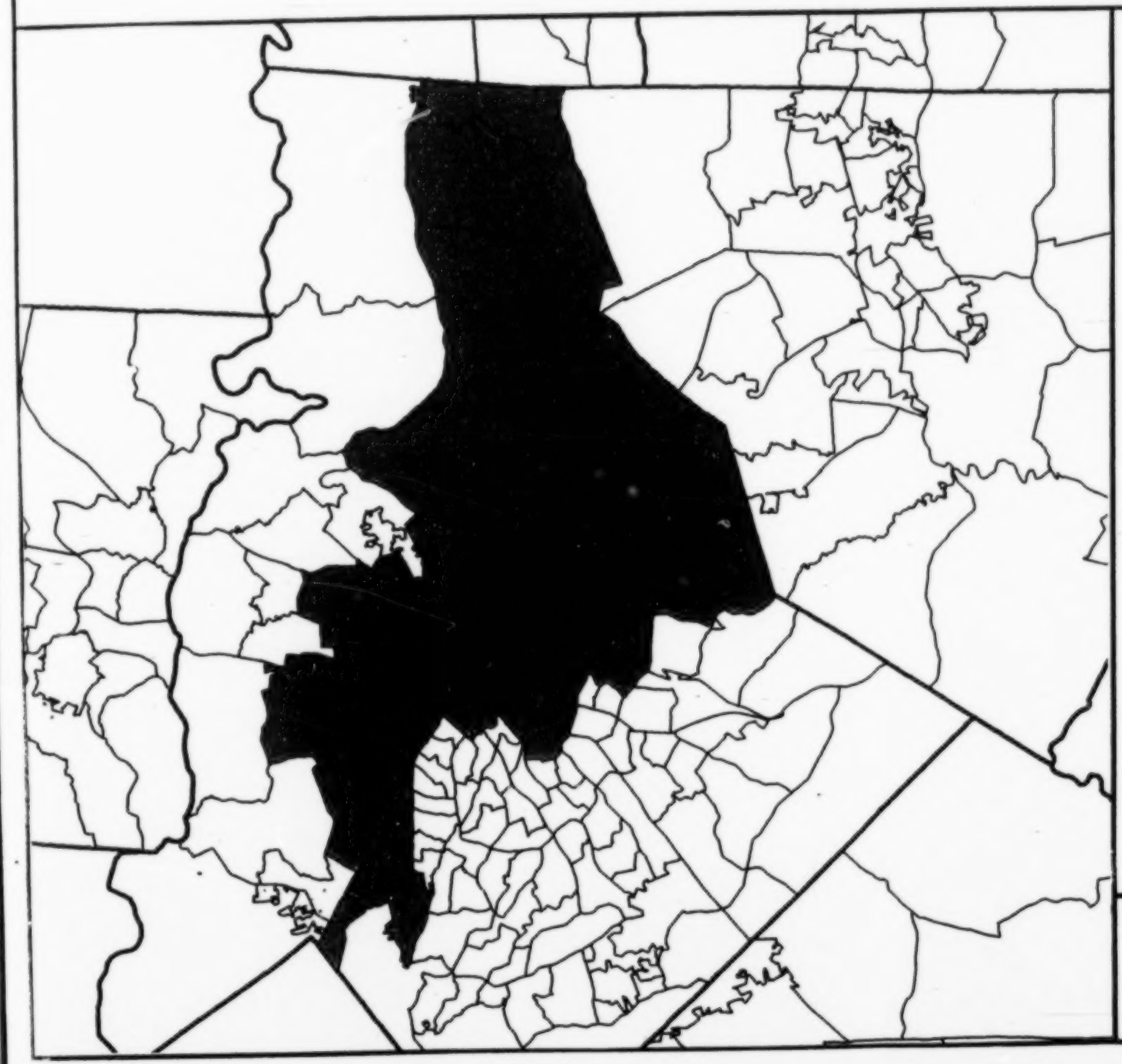
Mecklenburg County District 12 Precincts



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